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Supreme Court of the United States

OCTOBER TERM, 1952.

No. 282

DEALER'S TRANSPORT COMPANY,
Petitioner,

vs.

PAUL C. GRASSE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

Dealer's Transport Company, the petitioner herein, prays that a writ of certiorari be issued to review the judgment of the Supreme Court of Illinois, entered in the above entitled cause on May 23, 1952.

Opinions Below.

The final opinion of the Supreme Court of Illinois, which is dated May 20, 1952, was issued at the time of denying Petitions for Rehearing, and is reported in 412 Ill. 179 (R. 23-42) In denying the Petitions for Rehearing some 12 of the 18 pages of an earlier opinion were revised and the old portions superseded, so that the opinion reported is now the final and single opinion of the Court. The opinion of the Circuit Court of Illinois (R. 16-21) is not officially reported.

Jurisdiction.

The judgment of the Supreme Court of Illinois was entered on May 23, 1952, after denial of the Petitions for Rehearing on May 20, 1952 (R. 43...). The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

The judgment of the Supreme Court of Illinois reversed a judgment denying a motion to strike out a defense; struck out the defense as insufficient; reinstated Count I of the complaint; and finally determined the unconstitutionality of the statute in question. It is a final judgment within the meaning of 28 U.S.C. 1257 because:

1. The judgment below conclusively disposes of a matter distinct from the general subject of the litigation, in that it finally adjudicates the unconstitutionality of the first paragraph of Section 29 of the Workmen's Compensation Law of Illinois—the only federal question in the case. And a constitutional question once decided by the Supreme Court of Illinois may not be raised again in the Illinois Courts. *People* v. *Blenz* (1925) 317 Ill. 639, 641, and cases cited; *Nichols, Illinois Civil Practice*, sec. 6583. It is the rule of this Court that a state court judgment is final for purposes of jurisdiction when it conclusively disposes of such a separable matter. *Radio Station WOW* v. *Johnson* (1945) 326 U. S. 120, 124-127; *Clark* v. *Williard* (1934) 292 U. S. 112; *Carondelet Canal Co.* v. *Louisiana* (1914) 233 U. S. 362, 372; *Forgay* v. *Conrad* (1848) 6 How. 201; 48 Harv. L.R. 302. The word "final" is not understood by this Court in a "strict and technical sense", but is given a "liberal" and "reasonable" construction. *Forgay* v. *Conrad* (1848) 6 How. 201, 203. In none of the cases cited above was the entire case disposed of by the State Court, but in each certain matters were finally disposed of. As was said in the *Carondelet* case, *supra*,

"In the case at bar there is distinct and explicit finality and the further proceedings are directed to apply only to the 'questions reserved'." 233 U. S. 362, 372, quoted in the *WOW* case, 326 U. S. 120, 127.

"For the purpose of the finality which is prerequisite to a review in this Court, the test is * * * whether the record shows that the order of the appellate court has in fact fully adjudicated rights and that that adjudication is not subject to further review by a state court (See *Gorman* v. *Washington Univ.*, 316 U.S. 98)" *Dept. of Banking* v. *Pink* (1942) 317 U.S. 264, 268.

In our case, the burning question of constitutionality has been finally adjudicated, and the steps remaining to be taken in the litigation are the simple steps in a negligence case which could not remotely give rise to a federal question. See *Radio Station WOW* v. *Johnson* (1945) 326 U. S. 120, 127.

2. It is fundamental to the further conduct of the case, in that, if the judgment is permitted to stand (a) the statute is unconstitutional, (b) Count I of the complaint is to be reinstated for trial and (c) Count II must be stricken out. Conversely, if the decision below is reversed by this Court, the statute will be constitutional, Count I of the complaint must be stricken, and Count II may go to trial on a different theory. It is the rule in this Court that a judgment of a Court of Appeals may be reviewed on certiorari where it is "fundamental to the further conduct of the case": *United States* v. *General Motors Corp.* (1945) 323 U. S. 373, 377; *Land* v. *Dollar* (1947) 330 U. S. 731, 734; *Larson* v. *Domestic & Foreign Corp.* (1948) 337 U. S. 682, 685. See *Brown* v. *Western Railway of Alabama* (1949) 338 U. S. 294. See also *Hanover Star Milling Co.* v. *Metcalf* (1916) 240 U. S. 403; *Forsyth* v. *Hammond* (1897) 166 U. S. 506.

Questions Presented:

1. The Illinois Workmen's Compensation Law provides (Secs. 3, 6 and 11) that an Employee who is injured by a Third Party Employer in the course of his employment by a First Party Employer, whether the Third Party Employer is negligent or not, must be paid compensation by the First Party Employer, and that compensation is the Employee's exclusive remedy. The first paragraph of Section 29 of the Act "transfers" the common law right of suit of an Employee, who is injured by a negligent Third Party Employer subject to the Act and who is entitled to compensation therefor, to the First Party Employer liable for the compensation. It enables the First Party Employer to recover from a negligent Third Party Employer in an amount not exceeding the aggregate compensation which is payable, and leaves the Employee only his right of compensation.

The first question presented is whether the first paragraph of Section 29 may be held to be unconstitutional as beyond the scope of the police power, on the ground that it is not a regulation of the "master-servant" or "employment" relationship.

2. The first paragraph of Section 29 provided that the liability of a negligent Third Party Employer who *is* subject to the Act, for injury suffered by an Employee in the course of his employment by a First Party Employer, should be in the amount of compensation payable to the Employee by the First Party Employer. The second paragraph of Section 29, however, dealing with the situation where the injury suffered by the Employee in the course of his employment by the First Party Employer is caused by a negligent Third Party Employer who is *not* subject to the Act, specifically provides for a

right of action by the Employee against such a Third Party Employer, without limitation as to amount. The First Party Employer is to be reimbursed, out of the proceeds of such recovery, for compensation paid to the Employee.

The second question presented is whether the first paragraph of Section 29, standing alone, may be held to be unconstitutional on the ground that it sets up "classifications" which violate due process and equal protection.

3. Assuming, *arguendo*, that the first paragraph of Section 29 is unconstitutional on some ground, the third question is whether partial invalidity is possible on the ground that the first paragraph of the Section, even though deeply meshed in practical operation with Sections 3, 6 and 11 and the second paragraph of the Section, is wholly severable from and unrelated to other portions of the Act.

Statute Involved.

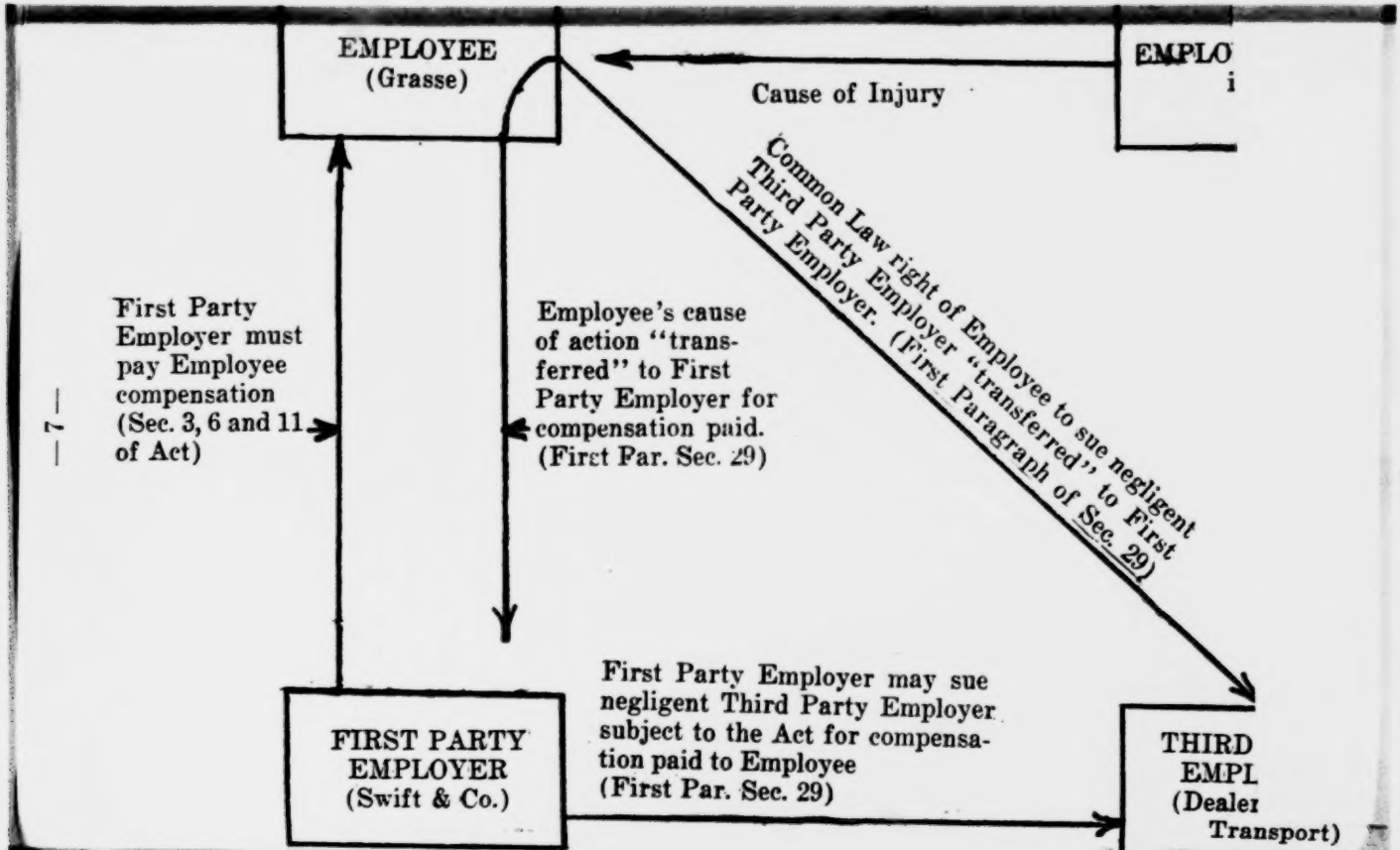
The first paragraph of Section 29 of the Workmen's Compensation Act of Illinois (in 1951 rearranged in Smith Hurd Illinois Statutes in Sec. 138.5(b)), which the Supreme Court of Illinois held to be unconstitutional, provides as follows:

> "Sec. 29. WHERE INJURY CAUSED UNDER CIRCUMSTANCES CREATING A LEGAL LIABILITY IN SOME PERSON OTHER THAN THE EMPLOYER. Where an injury or death for which compensation is payable by the employer under this Act was not proximately caused by the negligence of the employer or his employees, and was caused under circumstances creating a legal liability for damages in some person other than the employer to pay damages, such other person having also

elected to be bound by this Act, or being bound thereby under section three (3) of this Act, then the right of the employee or personal representative to recover against such other person shall be transferred to his employer and such employer may bring legal proceedings against such other person to recover the damages sustained, in an amount not exceeding the aggregate amount of compensation payable under this Act, by reason of the injury or death of such employee."

Related portions of the Illinois Workmen's Compensation Act, Sections 3, 6 and 11 and the second paragraph of Section 29 thereof, are set forth in the Appendix.

Set forth opposite is a diagram of the paragraph as it relates to the allegations of the complaint:


EMPLOYEE
(Grasse)
Cause of Injury
EMPLO
i
Common Law right of Employee to sue negligent Third Party Employer "transferred" to First Party Employer. (First Paragraph of Sec. 29)
First Party Employer must pay Employee compensation (Sec. 3, 6 and 11 of Act)
Employee's cause of action "transferred" to First Party Employer for compensation paid. (First Par. Sec. 29)
First Party Employer may sue negligent Third Party Employer subject to the Act for compensation paid to Employee (First Par. Sec. 29)
FIRST PARTY EMPLOYER
(Swift & Co.)
THIRD EMPL
(Dealer
Transport)

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Summary Statement.

Plaintiff-Respondent, Paul C. Grasse, is an employee of Plaintiff, Swift & Company, a corporation, (R. 4, 6). He alleges in Count I of his complaint that he was injured while driving a Swift truck "in the course of and arising out of his employment" by Swift & Company (R. 4) by the negligence of an employee of Defendant-Petitioner, Dealer's Transport Company, a corporation (R. 2, 3,-5). He asks common law damages in tort.

In Count II of the complaint plaintiffs rely on the first paragraph of Section 29 of the Illinois Workmen's Compensation Act (in 1951 rearranged in Smith Hurd Illinois Statutes in Sec. 138.5(b)), alleging that, pursuant to that Act Plaintiff Swift & Company has paid Plaintiff Grasse some $9,134.79 as Workmen's Compensation. They allege that "under and by virtue of the provisions of Section 29 of the said Workmen's Compensation Act the Plaintiff Swift & Company is entitled to have judgment against the defendant to reimburse Swift & Company" for the compensation payments made to Grasse (R. 5).

In Paragraphs 8, 9 and 10 of its answer, Defendant-Petitioner set up an additional defense to Count I, the defense that Plaintiff Grasse had been paid compensation by Plaintiff Swift & Company under the Illinois Workment's Compensation Act, and that his cause of action against Defendant, if any, was accordingly thereby "transferred" to his employer, Swift & Company by virtue of the provisions of the first paragraph of Section 29. This additional defense and Count II of the complaint are similar in legal import. Both rely on the first paragraph of Section 29.

The plaintiff moved to strike Paragraphs 8, 9 and 10 of the defendant's answer, on the ground that the first paragraph of Section 29, the basis of Count II of his complaint, was unconstitutional and hence not a defense to Count I thereof.

The motion to strike was denied by Circuit Court Judge Harry Fisher, who held that Paragraphs 8, 9 and 10 "constitute a valid defense to the claim alleged in Count I" and entered a judgment dismissing Count I (R. 1~~6~~, ~~19~~). On appeal to the Supreme Court of Illinois, however, the judgment of the Circuit Court was reversed, the motion was granted, the additional defense was stricken on the ground that the first paragraph of Section 29 was unconstitutional, and Count I was reinstated.

Specification of Errors.

1. The Supreme Court of Illinois erred in holding that the first paragraph of Section 29 of the Illinois Workmen's Compensation Act is not a regulation of the "master-servant" or "employment" relationship.

2. The Supreme Court of Illinois erred in holding that the first paragraph of Section 29 regulates "tort liability between persons who have no employment or other relationship".

3. The Supreme Court of Illinois erred in holding the first paragraph of Section 29 to be beyond the scope of the police power.

4. The Supreme Court of Illinois erred in holding the first paragraph of Section 29 to be unconstitutional.

5. The Supreme Court of Illinois erred in holding that the first paragraph of Section 29 sets up "classifications" which are arbitrary and a violation of due process and equal protection.

6. The Supreme Court of Illinois erred in refusing to hold the first paragraph of Section 29 to be a valid exercise of the police power.

7. The Supreme Court of Illinois erred in permitting plaintiff Grasse to assail the constitutionality of the first paragraph of Section 29.

8. The Supreme Court of Illinois erred in refusing to hold that plaintff is estopped to assail the constitutionality of the first paragraph of Section 29.

9. The Supreme Court of Illinois erred in refusing to hold that if the first paragraph of Section 29 could be held to be unconstitutional, the entire Workmen's Compensation Act of Illinois is unconstitutional and partial invalidity is impossible.

REASONS FOR GRANTING THE WRIT.

1. The Decision Below is in Hopeless Conflict with Northern Ry. v. Meese, (1916) 239 U.S. 614 and the Whole Theory of Constitutionality of Workmen's Compensation Laws as Laid Down by this Court.

A. The Basic Question, Whether the Statute Regulates the Master-Servant Relationship, is a Federal Question.

The first paragraph of Section 29 is an integral part of the Illinois Workmen's Compensation Act as passed in 1913 and revised in 1917. It has been in force unshadowed by any claim of possible invalidity for over 35 years. But the Court below suddenly decided on May 20, 1952 that the Section did not even regulate the "master-servant" or "employment" relationship and hence was not constitutional under the police power, saying (412 Ill. 191, R.3/...):

> "Section 29, however, does not purport to regulate the relationship between employers and employ-

ees, which are a recognized class for special legislation, but modifies, and even eliminates under some circumstances, the tort liability of third parties who negligently injure employees engaged in another enterprise. It is evident, therefore, that the basis and justification for sustaining the exercise of the police power for the major portion of the Workmen's Compensation Act does not apply to section 29, which treats of a different situation, and regulates tort liability between persons who have no employment or other relationship. The fact that other portions of the act constitute a reasonable exercise of the police power does not mean that section 29, which has a different and distinct purpose, is *per se* a proper exercise of the police power."

The Court below conceded that if the Section, like the other provisions of the Act, did regulate the master-servant or employment relationship, it would be constitutional as a reasonable exercise of the police power, saying (412 Ill. 190, 191, R.3/):

"As hereinbefore noted, the constitutionality of the Illinois Workmen's Compensation Act, as well as those of other States, has been sustained as a valid exercise of this police power. (*New York Central Railroad Co.* v. *White,* 243 U. S. 188.) However, it is evident that the primary purpose of the Workmen's Compensation Act is to afford employees and their dependents a measure of financial protection, (*Baker & Conrad, Inc.* v. *Chicago Heights Construction Co.,* 364 Ill. 386, 393,) and that a major portion of the statute pertains, not to tort liability, but to a system for imposing liability without fault upon employers for the benefit of their own employees. The basis upon which the validity of such legislation was sustained was as a regulation of the master-servant relation. Inasmuch as the general public had an interest in the loss of life and disability incurred in the course of a hazardous employment, this system

> of liability and compensation between employers and their own employees injured in the course of their employment was deemed to be a reasonable exercise of the police power."

The right to exercise the police power is vested in the States, and the existence of that right is federally-guaranteed to the Legislatures and people of the States, including this Petitioner, by the Tenth Amendment. Since it is a federal right, the questions which underlie it or upon which its existence depends, are federal questions. Accordingly, when the constitutionality of a State Workmen's Compensation Law under the police power depends upon whether it regulates the "master-servant" or "employment" relation, that question is a federal question for decision by this Court. *Crowell* v. *Benson* (1932) 285 U. S. 22, 56, and see *New York Central R. R.* v. *White* (1916) 243 U. S. 188, 197, 198.

As was said in *Crowell* v. *Benson* (1932) 285 U. S. 22, 56, in dealing with the Longshoremen's and Harbor Workers Compensation Act, a similar statute:

> "In the present instance, the Congress has imposed liability without fault only where the relation of master and servant exists in maritime employment and, while we hold that the Congress could do this, the fact of that relation is the pivot of the statute and, in the absence of any other justification, underlies the constitutionality of this enactment."

Just as in *Crowell* v. *Benson* the fact of the master-servant relation was the pivot of the statute and underlay the constitutionality of a statute enacted under the power of Congress to alter the rules of liability in admiralty jurisdiction, so in our case the fact of the master-servant relation is the pivot of a similar statute and underlies its constitutionality under the police power.

Moreover, the delineation of the scope of the police power under the Tenth Amendment, as a Federal right guaranteed to the people of the States, is a matter for final determination by this Court. This Court has delineated with some care the scope of the Tenth Amendment as a Federal right, when the question was possible invasion of the police power by the Federal Government. *United States* v. *Butler* (1936) 297 U. S. 1, 37, 68; *Schechter Corp.* v. *United States* (1935) 295 U. S. 495, 544-546; *Hammer* v. *Dagenhart* (1918) 247 U. S. 251, 276; *Kansas* v. *Colorado* (1907) 206 U. S. 46, 89, 90. It should also do so here, where this Petitioner has been denied the benefits of the police power; and where the State Legislature affirms and the State Judiciary denies the existence of this federally-guaranteed right of police power as the constitutional foundation of the statute.

B. The First Paragraph of Section 29 Does Regulate the Master-Servant Relationship.

We submit that the first paragraph of Section 29 is a perfectly clear regulation of the master-servant or employment relationship, for the reason that the "master-servant" or "employment" relationship is its subject matter. All that that paragraph purports to do is to "transfer" the common law cause of action, if any, which the Employee has against a negligent Third Party Employer subject to the Act, to his First Party Employer liable for compensation. The latter is given what is essentially a subrogation right to recover the amount of compensation payable to the Employee as required by Sections 3, 6 and 11 of the Act, and recovery is limited to that amount.

Also, the first paragraph of Section 29 is definitely meshed with Sections 3, 6 and 11 of the Act which require

the payment of compensation to the Employee by the First Party Employer in the event of injury by a Third Party Employer in the course of the Employee's employment, whether the Third Party Employer is negligent or not. While the Employee's common law right of recovery against a Third Party Employer is transferred to the First Party Employer, under Sections 3, 6, and 11 the Employee is given, to compensate for the transfer, a right of compensation for injury, regardless of fault, including injury by a Third Party Employer where there is no negligence. And while the Third Party Employer's liability is limited in amount, in this particular situation, as compensation therefor, the additional burden of liability without fault is imposed upon him for injuries suffered by his own employees, including those caused by employees of other Third Party Employers.

C. The Meese Case Upheld a Similar Statute as a Regulation of the Master-Servant Relationship.

Moreover, except for the decision below, it may perhaps be said to be universal law in this country that Workmen's Compensation Statutes regulating the relations of the Employee, First Party Employer and Third Party Employer do constitute regulation of the master-servant or employment relationship, valid under the police power.

That appears to be settled in this Court by *Northern Pacific Railway Co.* v. *Meese,* (1916), 239 U. S. 614, which is on all fours with our case so far as the character of the regulation of such a statute is concerned. There Meese, an employee of the Seattle Brewing Company, was killed in the course of his employment, and his heirs were entitled to compensation therefor under the Workmen's Compensation Law of the State of Washington. They claimed that Meese was killed through the

negligence of the Northern Pacific and sued the latter in tort. The Northern Pacific demurred on the ground that the Workmen's Compensation Law of Washington, a compulsory act similar to ours, had provided an exclusive remedy for injuries caused by third parties and suffered by workmen within the course of their employment, and that the Washington act had thus absolutely cut off any right to sue the third party Railway in tort.

The plaintiff contended bluntly that "To extend the application of the Workmen's Compensation Law to right of action of a workman against a third person under the facts of this case, would be unconstitutional, and would be a discrimination against the respondents and not an equal protection under the law." (239 U. S. 616).

This Court rejected Meese's contention, sustained the demurrer and dismissed the complaint, relying on the articulate opinion of *Peet* v. *Mills* (1913) 76 Wash. 437, from which it quoted as follows, spelling out how the employment relation was affected by the statute:

> " " * * The conclusion is evident that, in the enactment of this new law, the Legislature declared it to be the policy of this State that every hazardous industry within the purview of the act should bear the burden arising out of injuries to its employes; and that it was the further policy of the State to do away with the recognized evils attaching to the remedies under existing forms of law and to substitute a new remedy that should be ample, full and complete, *reaching every injury sustained by any workman while employed in any such industry, regardless of the cause of the injury or the negligence to which it might be attributed.* We can conceive of no language the Legislature might have employed that would make its purpose and intent more ascertainable than that made use of in the first section of the act. To say with appellant that the intent of

> the act is limited to the abolishment of negligence as a ground of action against an employer only is to overlook and read out of the act and its declaration of principles the economic thought sought to be crystallized into law, that the industry itself was the primal cause of the injury and, as such, should be made to bear its burdens * * * That in so doing the *legislative mind was intent upon the abolishment of all causes of action that may have theretofore existed, irrespective of the persons in favor of whom or against whom such right might have existed,* is equally clear from the language of section 5 of the act, containing a schedule of awards, and providing that each workman injured in the course of his employment should receive certain compensation, and "such payment shall be in lieu of any and all rights of action whatsoever against any person whomsoever" * * *' For these reasons we are of the opinion that the compensation provided by the act in case of injury to any workman in any hazardous occupation was intended to be exclusive of every other remedy, and that all causes of action theretofore existing except as they are saved by the provisos of the act, are done away with." (Emphasis added)

Northern Pacific Railway Co. v. *Meese, supra,* is the settled law in this Court. We cited it repeatedly to the Court below, but that Court did not even deign to mention it. Now the decision below would silently undermine the *Meese* case on this question of federal law, and deprive the people of Illinois, including the Petitioner, of its benefits. Hence we submit that the decision below cannot be allowed to stand without demolishing the very theory upon which State Workmen's Compensation Laws dealing with Employees, First Party Employers and Third Party Employers have been upheld by this Court under the police power—the theory that such statutes do regulate the "master-servant" or "employment" relationship.

The Court below simply failed to grasp the practical operation and effect of the first paragraph of Section 29 under the police power guaranteed by the Tenth Amendment.

2. The Decision Below is also in Hopeless Conflict With All Other Cases Upholding the Constitutionality of Similar Laws.

Moreover, following the *Meese* case, many states have regulated this relationship between the Employee, the First Party Employer and the Third Party Employer, as part of Workmen's Compensation Schemes, in various ways. And the constitutionality of these laws has been universally upheld under the police power. While Washington cuts off all right of action by the Employee against the Third Party Employer, (the *Meese* case, *supra*), some states require an election. Under these statutes, if the Employee elects to seek compensation from the First Party Employer, he becomes forever barred from a recovery in tort against the Third Party Employer. This is another type of perfectly clear regulation of the relationship between the Employee, the First Party Employer and the Third Party Employer. *Mosely* v. *Lily Ice Cream Co.*, (1931) 38 Ariz. 417, 300 P. 958; *Mitchell* v. *Usilton* (1922), 146 Tenn. 419, 242 S.W. 648; *Eagle Picher Lead Co.* v. *Kirby* (1925) 109 Okla. 96, 235 P. 176; *Hicks* v. *Peninsula Lumber Co.* (1923) 109 Ore. 305, 220 P. 133; *Travelers Insurance Co.* v. *Louis Padula Co.*, (1918, 224 N. Y. 397, 121 N.E. 348. Compare the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 933.

Without exception, moreover, the decisions dealing with similar statutes insofar as they reflect light on the character of the subject matter regulated, indicate clearly

that it is the "master-servant" or "employment" relation which is regulated.

> "To sum up, our act positively ends the 'jurisdiction of the courts' on 'all phases' of master and servant liability. Now, it is undeniable that liability for a stranger's acts on the premises is one of those phases * * *." (*Stertz* v. *Industrial Ins. Com.*, 158 Pac. 256, 91 Wash. 588.

There is a "community of interest as between the employer and the employee in the action against the negligent third person * * * there is but one cause of action." (*Black, Sivalls & Bryson* v. *Sheahan* D. C. Kans. 1950) 88 F. Supp. 639.)

> "In the *Clark* case we declared that whether an employee injured by a third person shall receive payment under the compensation act and also be accorded the right to sue the tort feasor for damages and thus, in effect, permit double recovery, is a matter of legislative control." (*Chisholm* v. *Vocational School for Girls* (1937) 64 P. (2d) 838, 103 Mont. 503)
>
> "Why should the right to sue an independent tort feasor be taken from the employee? Whatever the answer may be, the fact is that the Legislative Assembly had the power to take away the right (unless already accrued) if it saw fit to do so. * * *
>
> "* * * the wrongdoer in such cases may be financially responsible, and yet he may not—in most cases he is not. In either case the employee receives compensation * * *". (*Clark* v. *Olson* (1934) 31 P. (2d 283, 96 Mont. 417)
>
> "The statute in question deprives the plaintiff of her common law cause of action against the defendant but it establishes another remedy in its place, to wit: the right of compensation against her employer." (*Fellows* v. *Seymour* (1939) 171 Misc. 833, 13 N.Y.S. (2d) 803.)

Other cases hold that compensation may be made the "exclusive remedy" for injuries caused by a Third Party Employer which are suffered by an Employee in the course of his employment.

Georgia Casualty Co. v. *Haygood* (1923) 97 So. 87, 210 Ala. 56.

Victory Sparkler & Specialty Co. v. *Franks* (1925) 128 A. 635, 147 Md. 368.

Bruce v. *McAdoo* (1922) 211 P. 772, 65 Mont. 275.

King v. *Union Oil Co. of Cal.* (1933) 24 P. (2d) 345, 144 Or. 655.

3. The Alternative Holding of the Court Below that the Statute Sets Up "Classifications" Which Are Arbitrary and Unconstitutional is Contrary to the Applicable Decisions of this Court and So Patently Untenable as to Be Fanciful.

First, we have this basic question, whether the statute regulates the master-servant or employment relation. And we have argued above that, if the decisions of this Court are to be followed, that question should be answered in the affirmative.

Second, to hold that the statute does regulate the master-servant or employment relationship is to demolish the alternative holding below that the statute regulates "tort liability between persons who have no employment or other relationship".

Here, however, arguing in the alternative, we shall endeavor to show that even on the assumption of the Court below that the latter is only what was regulated, the Court below was wholly in error in its holding as to the practical operation and effect of the statute and that its alternative holding of unconstitutionality is so patently

untenable as to be fanciful and wholly devoid of logical support.

The Court below, after relying on *Truax* v. *Corrigan* (1921) 257 U. S. 312, said that the statute set up "arbitrary classifications" of "injured employees", in that two classes of "injured employees" were established, those injured by a Third Party Employer subject to the act who could not be sued in tort, and those injured by a Third Party Employer not subject to the act who could be sued in tort. This, said the Court below, was an "arbitrary classification" (R. 32, 35-36)

In going that far, moreover, the Court below misstated our contentions, saying that we had contended below that "the alleged classifications have been established by judicial interpretation" (412 Ill. 193, R. 33.). But that is error. We contended there, as we do here, that the first paragraph of Section 29 (for that is all that is here involved) does not set up any "classifications" at all. On the contrary, the decisions of this Court dealing with due process and equal protection merely require, in this connection, that all persons subject to legislation be treated alike in the same situation and under like circumstances and conditions. *Southern R. Co.* v. *Greene*, (1910) 216 U. S. 400; *Barbier* v. *Connolly* (1885) 113 U. S. 27, 31-32.

Under the first paragraph of Section 29, all persons affected are governed by the same rule in the same situation or circumstance. There are not several classes of "injured Employees" but only a single class of "Employees", set up by the first paragraph of the Section.

Even the entire Section 29 treats all Employees subject to the Act alike. That is, *all* Employees in the situation of injury by a negligent Third Party Employer subject to the Act are entitled only to compensation and may

not sue the Third Party Employer in tort. And *all* Employees subject to the Act who are injured by a negligent Third Party Employer who is not subject to the Act may sue the latter in tort, the proceeds thereof to go first to reimburse the First Party Employer for compensation paid.

All First Party Employers subject to the Act may recover over against a negligent Third Party Employer for compensation paid to the Employee.

All Third Party Employers subject to the Act are liable only for compensation paid by the First Party Employer.

As for Third Party Employers not subject to the Act, they are all treated alike but governed by entirely different rules, as indeed, under *New York Central* v. *White* (1916) 243 U. S. 188, may be done. They may be sued in tort.

The first paragraph of Section 29 simply does not set up "classifications" of "injured employees". In holding otherwise the Court below fell into a profound error as to the operation and effect of the statute, which is fundamental enough to render the alternative ground of its holding untenable on its face.

4. In Permitting Plaintiff Grasse to Assail the Constitutionality of Section 29, the Decision Below is in Conflict with the Applicable Decisions of this Court.

The complaint, paragraph 10-13 (Record pp. 5, 6) admits in perfectly clear language that the plaintiff was injured by his employer, Swift & Company, which he alleges is bound by the Workmen's Compensation Act of the State of Illinois, and that Swift & Company has made "compensation payment" • • • under the provisions of said Workmen's Compensation Act to the plaintiff. Indeed, in Paragraph 11 of the complaint, (R. 3) the plaintiff ad-

mits that he has been paid the sum of $9,134.79 by Swift & Company "*as required by the provisions of the said Illinois Workmen's Compensation Act*". He further alleges, Paragraph 12, that Swift & Company may hereafter be required to pay out additional sums of money to the plaintiff "in compensation payments". Thus plaintiff has voluntarily sought and obtained the benefits under the Act running to over $9,000. With the cash benefits of the Act safely in his pocket, he now seeks to avoid a restriction specifically imposed by the legislature to balance, and as the very consideration or compensation for, the making of these cash benefits available to him. Stated another way, the plaintiff wishes to eat his cake and have it, too.

In permitting this plaintiff to claim under the Act and accept its compensation benefits with one hand, and assail its constitutionality with the other, the decision below is contrary to the settled line of decisions of this Court beginning with *Daniels* v. *Tearney* (1880) 102 U.S. 415 and collected and discussed in *Gray* v. *Commodity Credit Corporation* (1945) 63 F. Supp. 386. It is also contrary to the applicable state decisions which hold that a person may not accept Workmen's Compensation and then assail provisions of the Act governing the award thereof. *Ethen* v. *North Dakota Workmen's Compensation Bureau,* (1932) 244 N.W. 32, 62 No. Dak. 394; *Ison* v. *Western Vegetable Distributors,* (1936) 59 P. (2d) 649, 48 Ariz. 104.

Moreover, plaintiff Grasse, an Employee, may not assail the constitutionality of the section insofar as it might classify or affect either First Party Employers or Third Party Employers, for any such problems do not affect his legal rights and he has no legal standing to complain with respect thereto. *Arkadelphia Co.* v. *St. Louis S.W. Ry. Co.,* (1919) 249 U.S. 134; *Ison* v. *Western Vegetable Distributors,* (1936) 59 P. (2d) 649, 655, 48 Ariz. 104; *Cuthbertson* v. *Union Pacific Coal Co.,* (1936) 62 P. (2d) 311, 315.

The speculative and abstract dissertation of the Court below on these subjects has no basis in our judicial system, and is contrary to the well-settled rule that constitutional questions may not be passed upon in the abstract but only in genuine cases or controversies. It is inappropriate here to dwell on the point that the Court's conclusions on these academic matters were also erroneous.

5. The First Paragraph of Section 29 is So Integrated With the Balance of the Act That the Act Must Stand or Fall in Its Entirety.

Sections 3, 6 and 11, not the first paragraph of Section 29, of the Act require the payment of compensation by the First Party Employer to the Employee in the event of injury by a Third Party Employer. And so far as the Third Party Employer subject to the Act is concerned, by limiting the amount of his liability, Sections 6 and 29 provide a *quid pro quo* or balancing "condition, consideration or compensation" (see *Cooley, Constitutional Limitations*, Eighth Edition, P. 362) for the other provisions of the Act which impose liability without fault upon him for injuries sustained by his Employees generally in the course of their employment, including injuries caused by other Third Party Employers.

We make this argument, not to urge that the whole Act be declared unconstitutional, but to show how integral a portion of the Act the first paragraph of Section 29 is, and that the effect of the decision below is to crudely mutilate the legislative purpose. And it further shows how vividly the statute does regulate the master-servant or employment relationship.

6. The Decision Below, Mutilating the Statute, Has Left Its Subject Matter in Chaos and Confusion.

The effect of the decision below is to invalidate the first paragraph of Section 29 as to Third Party Employers *automatically* bound, but to leave it in force as to those *electively* bound by the Act. This astounding result, something which the Legislature never intended, and suddenly making administration of the Act most difficult, illustrates the undesirable practical effects which flow from the failure of the Court below to grasp the relationship of the statute to the master-servant relationship and the police power.

7. The Great Practical Importance of Review by this Court.

We think it may be fairly stated that, if the decision below is allowed to stand;

A. From 1,000 to 5,000 new lawsuits against Third Party Employers liable for Workmen's Compensation will be filed within the next year, and in each succeeding year, as a result of the decision below. These will add to the heavy burdens already placed on the Illinois Courts, which are now four years behind in cases of this character.

B. The rate structures of the Chicago Transit Authority and Insurance Companies doing business in Illinois will be extensively revised upward, pushing insurance and transit fare rates even higher upward.

CONCLUSION.

The Court below utterly failed to grasp the practical operation and effect of the first paragraph of Section 29 on the master-servant relationship and the police power. A Writ of Certiorari should be granted.

Respectfully submitted,

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August 14, 1952.

APPENDIX.

Illinois Workmen's Compensation Act.

Sec. 3. APPLIES AUTOMATICALLY. The provisions of this Act hereinafter following shall apply automatically and without election to the State, county, city, town, township, incorporated village or school district, body politic or municipal corporation, and to all employers and all their employees, engaged in any department of the following enterprises or businesses which are declared to be extra hazardous, namely:

1. The erection, maintaining, removing, remodeling, altering or demolishing of any structure, except as provided in sub-paragraph 8 of this section.

2. Construction, excavating or electrical work, except as provided in sub-paragraph 8 of this section.

3. Carriage by land, water or aerial service and loading or unloading in connection therewith, including the distribution of any commodity by horse-drawn or motor driven vehicle where the employer employs more than two employees in the enterprise or business, except as provided in sub-paragraph 8 of this section.

4. The operation of any warehouse or general or terminal storehouses.

5. Mining, surface mining or quarrying.

6. Any enterprise in which explosive materials are manufactured, handled or used in dangerous quantities.

7. In any enterprise wherein molten metal, or explosive or injurious gases or vapors, or inflammable vapors or fluids, or corrosive acids are manufactured, used, generated, stored or conveyed in dangerous quantities.

7½. Any enterprise in which sharpedged cutting tools, grinders or implements are used, including all enterprises which buy, sell or handle junk and salvage, de-

molish or reconstruct machinery, except as provided in sub-paragraph 8 of this section.

8. In any enterprise in which statutory or municipal ordinance regulations are now or shall hereafter be imposed for the regulating, guarding, use or the placing of machinery or appliances or for the protection and safeguarding of the employees or the public therein; each of which occupations, enterprises or businesses are hereby declared to be extra hazardous: Provided, nothing contained herein shall be construed to apply to any work, employment or operations done, had or conducted by farmers and others engaged in farming, tillage of the soil, or stock raising, or to those who rent, demise or lease land for any such purposes, or to any one in their employ or to any work done on a farm or country place, no matter what kind of work or service is being done or rendered.

9. Any enterprise, business or work in connection with the laying out or improvement of subdivisions of tracts of land.

10. Any enterprise for the treatment of cross-ties, switch-ties, telephone poles, timber or other wood with creosote or other preservatives. [Amended by Act approved June 10, 1929.]

Sec. 6. Employee's Right To Recover Damages. No common law or statutory right to recover damages for injury or death sustained by any employee while engaged in the line of his duty as such employee, other than the compensation herein provided, shall be available to any employee who is covered by the provisions of this Act, to any one wholly or partially dependent upon him, the legal representatives of his estate, or any one otherwise entitled to recover damages for such injury; provided, however, that in any action now pending or hereinafter begun to enforce a common law or statutory right to recover damages for negligently causing the injury or death of any employee it shall not be necessary to allege in the declaration that either the employee or

the employer or both were not governed by the provisions of this Act or of any similar Act in force in this or any other State: Provided, further, that any illegally employed minor or his legal representatives shall, except as hereinafter provided, have the right, within six months after the time of injury or death, to file with the commission a rejection of his right to the benefits under this Act, in which case such illegally employed minor or his legal representatives shall have the right to pursue his or their common law or statutory remedies to recover damages for such injury or death; and provided, further, that no payment of compensation under this Act shall be made to an illegally employed minor, or his legal representatives, unless such payment has first been approved by the commission or any member thereof, and if such payment has been so approved such payment shall be a bar to a subsequent rejection of the provisions of this Act. [Amended by Act approved July 3, 1931.]

Sec. 11. Compensation Measure of Responsibility Employer Assumed Under Act. The compensation herein provided, together with the provisions of this Act, shall be the measure of the responsibility of any employer engaged in any of the enterprises or businesses enumerated in section three (3) of this Act, or of any employer who is not engaged in any such enterprises or businesses, but who has elected to provide and pay compensation for accidental injuries sustained by any employee arising out of and in the course of the employment according to the provisions of this Act, and whose election to continue under this Act, has not been nullified by any action of his employees as provided for in this Act. [Amended by Act approved June 25, 1917.]

Sec. 29 (Second Paragraph) Where the injury or death for which compensation is payable under this Act was not proximately caused by the negligence of the employer or his employees and was caused under circumstances creating a legal liability for damages on the part of some person other than the employer to pay damages, such other person having elected not to be bound by this Act, then legal

proceedings may be taken against such other person to recover damages notwithstanding such employer's payment of or liability to pay compensation under this Act. In such case, however, if the action against such other person is brought by the injured employee or his personal representative and judgment is obtained and paid, or settlement is made with such other person, either with or without suit, then from the amount received by such employee or personal representative there shall be paid to the employer the amount of compensation paid or to be paid by him to such employee or personal representative.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1952.

No. 282

DEALER'S TRANSPORT COMPANY,
Petitioner,

vs.

PAUL C. GRASSE,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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